IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

CRP.No. 564 of 2005()

AS.10/2001 of WAKF TRIBUNAL, KOZHIKODE
.....

REVN. PETITIONER:
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1. THAYYIL KUNHIMOHAMMED HAJI,
S/O.ABDUL RAHMAN HAJI, THAYYIL HOUSE,
P.O.MAMPURAM.

2. CHELUPADATHU RASHEED,
S/O.ALIKUTTY, PILAKKAL HOUSE,
P.O.MAMPURAM.

3. IRUKULANGARA ALAVIKUTY MUSALIYAR,
S/O.MOHAMMED KUTTY, PRAMMAL HOUSE,
P.O.MAMPURAM.

4. CHELUPADATH SUBARI,
S/O.HASSAN KUTTY, RUBEENA MANZIL,
P.O.MAMPURAM.

5. VALIYA PEEDIYEKKAL ATTAKOYA THANGAL,
S/O.IMBICHIKOYA THANGAL, SHEREEFA MANZIL,
P.O.MAMPURAM.

BY ADV. SRI.P.K.SURESH KUMAR
SRI.P.P.BASHEER
SRI.K.P.SUDHEER

RESPONDENTS:
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1. DARUL HUDA ISLAMIC ACADEMY,
HIDAYA NAGAR, CHEMMAD, POST TIRURANGADI,
MALAPPURAM DISTRICT, REPRESENTED BY ITS
SECRETARY CHERUMUKKAN ALAVIKUTTY ALIAS
KUNHAPPU HAJI, CHERUMUKKAN HOUSE, PULIKODE IN
KOTTAKKAL AMSOM AND DESOM OF ERNAD TALUK.

2. PUTHIYA MALIYEKKAL SYED ABDURAHIMAN
JIFRI, S/O.ALAVI JIFRI THANGAL,
BUSINESS, RESIDING AT KATCHERI AMSOM,
KURUMBRAKKATTUSSERI DESOM OF KOZHIKODE TALUK.

3. THE KERALA WAKF BOARD,
ERNAKULAM, REPRESENTED BY ITS
SECRETARY.

BY ADV. SRI.R.RAMADAS
SRI.A.A.ABUL HASSAN, SC, WAKF BOARD
SRI.VINOD RAVINDRANATH
SRI.T.P.KELU NAMBIAR (SR.)
SRI.P.A.ABDUL JABBAR, SC, WAKF BOARD
SRI.T.KRISHNAN UNNI

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 27/11/2007, THE COURT ON 18-12-2007 PASSED THE FOLLOWING:

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

C.R.P.No. 564 of 2005

Dated this the 18th day of December, 2007

O R D E R

Kurian Joseph,J.

Give unto God what belongs to Him and leave man to enjoy what belongs to him. If this balance is tilted, peace on earth is disturbed. Once a Wakf is duly created, the property belongs to God and the enjoyment is to be restricted to the dedicated purposes. There being a restriction on enjoyment of property, progeny is tempted or prompted to probe as to whether there is a valid Wakf at all. Which is the forum to first look into the matter is the crucial question arising for consideration in this case.

2. The petitioners are respondents 2, 5 and 8 in A.S.No.10/2001 on the file of the Wakf Tribunal, Kozhikode. The matter was pursued before the Tribunal by respondents 1 and 2 aggrieved by the suo motu steps of the Board to register 17 cents of property in Re-survey No.230/2 in Kozhikode district, which is popularly known as Mampram Makkam. The suit was

initially dismissed by the Tribunal holding that respondents 1 and 2 are not entitled to maintain an appeal before the Tribunal against the decision taken by the Wakf Board to register Mampram Makkam as Wakf property. The matter was taken up before this court in C.R.P.No.672/2002 and O.P.No.17924/2002. This Court disposed of the civil revision petition and the writ petition by common order dated 29-8-2002 holding that the finding of the Tribunal that the revision petitioner is not competent to file an appeal before the Wakf Tribunal is not correct in view of Section 83 of the Wakf Act. Therefore, this court held that "..... it is only just and proper to set aside the judgment of the Wakf Tribunal and remand the case to the lower court for fresh consideration". It was also observed that "admittedly, before taking a decision in respect of Mampram Makkam, no notice was issued either to the petitioner in C.R.P.No.672 of 2002 or to the petitioner in O.P.No.17924 of 2002. So the Wakf Board was not justified in suo motu registering Mampram Makkam as Wakf without giving notice to

the interested parties and without complying the procedure provided in the Wakf Act." Therefore, in the writ petition this court issued a direction to the Wakf Tribunal "..... to consider A.S.No.10 of 2001 on merit after giving an opportunity to the parties in the CRP and in the O.P. to substantiate their case".

3. The Tribunal, after an elaborate discussion of the facts and evidence, came to the conclusion that the Wakf Board has not properly exercised its jurisdiction in the matter of registration. It was noted that the affected parties had not been given an opportunity to place their contentions before the Board as to whether the disputed property is Wakf or not and hence the suo motu registration without such an opportunity was illegal and consequently remitted the matter to the board for fresh consideration.

4. The main contention of the petitioners is that in view of the mandate under Section 7 of the Wakf Act, 1995, the Wakf Tribunal alone is having jurisdiction to decide the question as to whether a property is Wakf property or not. It is also contended

that Section 32 of the Act dealing with the powers and functions of the Board does not contemplate any such power on the Board to decide as to whether the property is Wakf or not. Under Section 83 of the Act the Tribunal is the Forum to determine any dispute, question or other matter regarding the Wakf, it is contended. Reliance is placed on two bench decisions of this Court in (1) Pookoya Haji v. Cheriyakoya, 2003 (3) KLT 32 and (2) Madeena Masjid v. Kerala Jama Ath Islami Hind, 2007 (3) KLT 800, wherein it has been held that "The words any dispute, question or other matters relating to Wakf or Wakf property under S.85 are wide enough to take in within its sweep not only matters which are specifically conferred on the Tribunal by the various provisions of the Act but also any dispute, question or any other matter relating to any Wakf or Wakf property since those powers have also been conferred on the Tribunal by the Wakf Act itself. On examining the scheme of the Act and various provisions we are of the view that the intention of the Legislature is to resolve all disputes by one machinery and forum provided in

the Act itself, that is, the Wakf Tribunal and not by the Civil Courts in the State." The impugned order is defended by the respondents contending that if any question arises as to whether a property is Wakf property or not at the time of registration, the jurisdiction is that of the Board alone to decide the question after issuing notice to all the parties concerned. Since the Board exercised such power without hearing the affected parties, the decision is bad in law and the Tribunal is hence justified in remitting the matter to the Board to take a decision in accordance with the procedure contemplated under Section 40 of the Act.

5. In order to appreciate the rival contentions and for proper resolution of the dispute arising in this case it is necessary to refer to the relevant statutory provisions. Chapter II of the Wakf Act, 1995 comprising of Sections 4 to 8 deals with Survey of Wakfs. Section 4 provides for preliminary survey of Wakfs, Section 5 deals with publication of list of Wakfs by the Wakf Board, Section 6 deals with settlement of disputes regarding

Wakfs, Section 7 deals with the power of Tribunal to determine disputes regarding Wakfs and Section 8 deals with the recovery of costs of survey. Sub-section (3) of Section 4 to the extent relevant reads as follows:-

> "4(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report, in respect of Wakfs existing at the date of the commencement of this Act in the State or any part thereof, to the State Government....."

The Act came into effect on 22nd November, 1995. Section 5 reads as follows:-

> "5. Publication of list of Wakfs:- (1) On receipt of a report under sub-section (3) of Section 4, the State Government shall forward a copy of the same to the Board.
>
> (2) The Board shall examine the report forwarded to it under sub-section (1) and publish in the Official Gazette a list of Sunni Wakfs or Shia Wakfs in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed."

Section 6 reads as follows:-

"6. Disputes regarding Wakfs:-- (1) If any question arises whether a particular property specified as Wakf property in the list of Wakfs is Wakf property or not or whether a Wakf specified in such list is a Shia Wakf or Sunni Wakf, the Board or the mutawalli of the Wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final.

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of Wakfs.

Explanation:- For the purposes of this Section and Section 7, the expression "any person interested therein", shall, in relation to any property specified as Wakf property in the list of Wakfs published after the commencement of this Act, shall include also every person who, though not interested in the Wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under Section 4.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any Wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of Wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in sub-section (1)."

Section 7 to the extent relevant reads as follows:-

"7. Power of Tribunal to determine disputes regarding Wakfs:- (1) If, after the commencement of this Act, any question arises, whether a particular property specified as Wakf property in a list of Wakfs is Wakf property or not, or whether a Wakf specified in such list is a Shia Wakf or a Sunni Wakf, the Board or the mutawalli of the Wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final.

Provided that --

(a) in the case of the list of Wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of Wakfs; and

(b) in the case of the list of Wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a Civil Court in a suit instituted before such commencement, the Tribunal shall not reopen such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this Section in respect of any Wakf shall be stayed by any Court, Tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).

(4) The list of Wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so

modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a Civil Court under sub-section (1) of Section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."

On a close analysis of the provisions under Chapter II it is fairly clear that the dispute that is contemplated under Chapter II pertains to the dispute in respect of a property appearing in the list of Wakf property published by the Wakf Board. Only after publication of the list under Section 5, any dispute on a question can be raised. The power that is vested on the Tribunal to determine the issue regarding Wakf under Section 6 or Section 7 is only in respect of the question as to whether a particular property specified as Wakf property in the list of Wakfs is Wakf property or not, or whether it is Shia Wakf or Sunni Wakf. Therefore, the pre condition for invoking the jurisdiction of the

Tribunal under Section 6 of Section 7 is appearance of a property as Wakf property in the list of Wakfs published by the Wakf Board under Section 5 of the Act.

6. The Tribunal under Section 83(2) is empowered and entitled to determine any dispute or question or any matter relating to Wakf. Section 83(2) reads as follows:-

> "83(2). Any mutawalli or person interested in a Wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the Wakf."

But the crucial issue is what is the disputed question in this case. No doubt under Section 83 any muthawalli or a person interested in a Wakf or any person aggrieved by an order made under the Act or Rules is entitled to approach the Tribunal for the determination of any dispute, question or other matter relating to the Wakf as held by this Court in Pookoya Haji's case (supra) and followed in Madeena Masjid's case (supra). But Section 6 as well

as Section 7 specially and specifically provide for raising a dispute before the Tribunal for deciding a question as to whether enlistment of property as Wakf property is correct or not or whether a Wakf is Sunni or Shia. Actually there is no much difference between the procedure under Section 6 or Section 7. The differentiating factor is only that Section 7 deals exclusively with post 1995 Wakf Act scenario. A reading of Section 6 or Section 7 with Section 83 would show that the 'question' referred to in Section 83 in the background of Section 6 or Section 7 is a question only of a dispute regarding enlistment of a property as Wakf, or as Sunni Wakf or Shia Wakf.

7. Section 32, dealing with the powers and functions of the Board provides that "Subject to any rules that may be made under this Act, the general superintendence of all Wakfs in a State shall vest in the Board established for the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and the income

thereof is duly applied to the objects and for the purposes for which such Wakfs were created or intended." Under Section 32 (2) (n) and (o) the Board is empowered,

> "32(2)(n). to investigate and determine the nature and extent of Wakf and Wakf property, and to cause, whenever necessary, a survey of such Wakf property;
>
> (o) generally do all such acts as may be necessary for the control, maintenance and administration of Wakfs."

Chapter V of the Act comprising of Sections 36 to 43 deals with registration of Wakfs. Under Section 36 every Wakf shall be registered at the office of the Wakf Board, and if not penal sanction is contemplated. Power is also conferred on the Board for taking suo motu action. Section 40 deals with decision by the Wakf Board as to whether a property is Wakf property or not. The Section reads as follows:-

> "40. Decision if a property is Wakf property:-- (1) <u>The Board may itself collect information regarding any property which it has reason to believe to be Wakf property and if any question arises whether a particular property is Wakf property or not or whether a Wakf is a Sunni Wakf or a Shia Wakf, it may, after making</u>

such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal, be final.

(3) Where the Board has any reason to believe that any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 (2 of 1882) or under the Societies Registration Act, 1860 (21 of 1860) or under any other Act, is Wakf property, the Board may notwithstanding anything contained in such Act, hold an inquiry in regard to such property and if after such inquiry the Board is satisfied that such property is Wakf property, call upon the Trust or society, as the case may be, either to register such property under this Act as Wakf property or show cause why such property should not be so registered.

Provided that in all such cases, notice of the action proposed to be taken under this sub-section shall be given to the authority by whom the Trust or society had been registered.

(4) The Board shall, after duly considering such cause as may be shown in pursuance of notice issued under sub-section (3), pass such orders as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a Tribunal."

The provision is very clear under Section 40 that in the process of

registration of a Wakf property if any question arises as to whether a particular property is Wakf property or not or whether a Wakf is a Sunni Wakf or a Shia Wakf, it is for the Board to decide the question and the decision taken by the Board is subject to scrutiny only by the Tribunal and if not interfered by the Tribunal the decision is final. Just as the Tribunal getting jurisdiction under Section 6 or Section 7 of the Act to decide a question as to whether a property is Wakf or not only after the same is listed under Section 5, under Section 40 the Tribunal gets the jurisdiction to decide as to whether a property is Wakf or not only after the Board duly takes a decision as to whether such property is to be registered or not. It is that decision which is liable to be subjected to scrutiny by the Tribunal under Section 40 read with Section 83(2). The expression 'any dispute, question or other matter relating to the Wakf appearing under Section 83(2) has to be given a restricted meaning in its application as far as the disputes or questions under Section 6, Section 7 and Section 40. Enlistment of a property under Section

5 as Wakf and decision on registration under Section 40(1) by the Wakf Board are pre conditions for invocation of jurisdiction under Section 6 and Section 7 or under Section 40(2), read with Section 83(2) as the case may be. As held by the Privy Council in Nusserwanjee Pestonjee v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor, (1855) 6 Moore's Indian Appeals 134, which has been followed and settled by the Supreme Court as the correct legal position, in Kothamasu Kanakarathamma v. State of Andhra Pradesh AIR 1965 SC 304, Md.Hasnuddin v. State of Maharashtra, AIR 1979 SC 404, and in Sharda Devi v.State of Bihar, AIR 2003 SC 942, "wherever jurisdiction is given by a Statute and such jurisdiction is only given upon certain specified terms contained therein it is a universal principle that those terms should be complied with, in order to create and raise the jurisdiction, and if they are not complied with the jurisdiction does not arise." Here the question is whether there is a proper registration after due inquiry and to what extent such a decision by the Board has affected the status of Mambram Makkam. As

rightly contended by the learned counsel for the respondents, this court in the common order in C.R.P.No.672/2002 and O.P.No.17924/2002 has observed that no notice had been issued to the parties while the Board registering the property as Wakf property. What is the impact of such registration without notice to the parties is a matter directed by this court in the said order to be considered by the Tribunal. It may be noted that the Tribunal at the first instance had not considered the merits of the matter. It considered only the maintainability. The finding regarding the maintainability alone was the subject matter of the writ petition and revision petition before this court leading to the common order referred to above and that is why this court directed the Tribunal to take a decision after giving an opportunity to the parties in the civil revision petition and the original petition. It was in that background only the Wakf Tribunal framed the following issues:-

> "1. Whether the respondent/Wakf Board has conducted a fair and proper enquiry as per law in deciding the question as to whether the Makham property is to be registered as a wakf?

2. Whether the decision of the respondent board is liable to be interfered with?"

On issue No.1, after an elaborate discussion on the evidence and facts, the Tribunal rightly found that the Board has not gone into the relevant aspects with notice to the parties and that the affected parties had not got an opportunity before the Board to place their contentions while the Board registering the property as Wakf property. At the time and in the process of registration of a property as Wakf property, if a dispute arises as to whether a property is Wakf or not or whether a Wakf is Sunni Wakf or Shia Wakf, at that juncture the jurisdiction is only of the Wakf Board and the Board has to take a decision as per the prescribed procedure. If any party is aggrieved by the decision taken by the Board, it is at that point such party gets a right to move the Wakf Tribunal under Section 40 read with Section 83. It will be profitable in this context to refer to the decision of the Supreme Court in M.P.Wakf Board v. Subhan Shah, (2006) 10 SC 696, where it has been held as follows:-

> "The Wakf Act is a self-contained code. Section 32 of the 1995 Act provides for powers and functions of the Board. Section 32 (2) of the 1995 Act enumerates the functions of the Board without prejudice to the generality of the power contained in Section 32(1) thereof. The Tribunal was constituted for the purposes mentioned in Section 83 of the 1995 Act. It is an adjudicatory body. Its decision is final and binding but then it could not usurp the jurisdiction of the Board. There is no provision which empowers the Tribunal to frame a scheme. In the absence of any such power vested in the Tribunal, the Tribunal ought to have left the said function to the Board which is statutorily empowered therefor. Where a statute creates different authorities to exercise their respective functions thereunder, each of such authority must exercise the functions within the four corners of the statute. When a procedure has been laid down the authority must act strictly in terms thereof."

Thus the function of registration of a property as Wakf property, being that of the Board and since it is the duty of the Board in the process to decide a question as to whether a property is Wakf or not, it is for the Board to consider and decide the question at the first instance. The Tribunal can be called upon only to adjudicate on and after the decision taken by the Board on the disputed question. Petitioners submit that the present Chairman

of the Wakf Board is an interested party. But the decision is that of the Board. The learned Standing Counsel for the Board submits that in the proceedings and deliberations of the Wakf Board, interested members always abstain. Therefore, there is no basis for any apprehension. The Tribunal is hence right in remitting the matter to the Wakf Board to first decide on proper inquiry and with notice also to all the affected parties as to whether the disputed property is Wakf property or not. The parties are free to take all available contentions before the Board since they are also to be issued notice. If they are aggrieved by the decision of the Board, it will be open to them to invoke the jurisdiction of the Tribunal. Thus there is no merit in the civil revision petition. It is accordingly dismissed.

(KURIAN JOSEPH, JUDGE)

(HARUN-UL-RASHID, JUDGE)

ahg.

" C.R"

KURIAN JOSEPH &
HARUN-UL-RASHID, JJ.

C.R.P.No. 564 of 2005

O R D E R

18th December, 2007